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Cassie Geiken

University of Nebraska - Lincoln

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Mandatory Minimum Penalties:
An Analysis of Four State's Penal Codes and Federal Court Policies

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by
Cassie Geiken, BS
Criminal Justice and Criminology
College of Public Affairs and Community Service

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Faculty Mentor:
Dr. Chris Eskridge, PhD, Criminal Justice and Criminology

Abstract

In Nebraska, variations of similar bills, such as carryover LB 447, attempting to amend mandatory minimum laws in the state have been introduced in recent years. The harshness of the mandatory sentences still in effect, as well as the looming state of emergency caused by overcrowding in prisons, have caused the debate over sentencing laws to persist. This essay identifies the core issues of mandatory minimum sentencing laws and analyzes the states of Nebraska, Texas, Alabama, California, and the federal system's use of mandatory minimums for felony charges to identify potential solutions. Statute review found that Nebraska's current sentencing codes are misaligned with the rest of the nation; not even Alabama with one of the harshest penal codes in the United States uses mandatory minimums for their habitual criminal statutes. Of the penal codes that included mandatory minimum language, additional language was included to provide protections from harsh sentencing practices. When drafting legislation, Nebraska law-makers should consider the following recommendations. Looking to the practices of Texas and California, Nebraska should rid the penal code of mandatory minimum language to allow for a system entrenched in judicial discretion. To ensure violent offenders receive necessary programming before reentering the community, Nebraska could prohibit probation for certain crimes or felony classifications, similar to California's penal code. Nebraska could also adopt the federal system of using a "safety valve" relief mechanism that allows for prosecutorial discretion while maintaining clear guidelines and requirements. As for mandatory minimums attached to habitual criminal laws, Senator Pansing-Brooks bill, LB 1013, or one similar to California's Proposition 36, should be reconsidered by the legislature. Finally, Nebraska should watch out for any reactionary legislation to certain offenses; as seen by Alabama's mandatory minimum bill regarding trafficking in fentanyl, this type of legislation costs the state money and puts non-violent offenders in prison for longer.

Key Words: criminal justice, mandatory minimum, habitual offender, sentencing guidelines

Introduction

The questions surrounding mandatory minimum sentencing laws become the topic of debate anytime overcrowding in prisons, budgets, or criminal justice reform is discussed. Here in Nebraska, variations of similar bills attempting to amend mandatory minimum laws in the state have been introduced in recent years. Currently, carryover bill 447 has made waves by setting out to drastically change mandatory minimum sentences in Nebraska. The amended, toned-down LB 447 has been indefinitely postponed, and its goal to eradicate the terminology from Nebraska's penal code has been discontinued. The mandatory sentences still in effect, as well as the looming state of emergency caused by overcrowding in the prisons, have caused the debate over sentencing laws to persist. This essay aims to identify the core issues of mandatory minimum sentencing laws and analyze the states of Nebraska, Texas, Alabama, California, and the federal system's use of mandatory minimums for felony charges to identify potential solutions.

Terms Defined

The United States Sentencing Commission defines a United States' mandatory minimum sentencing law as "a federal criminal statute requiring, upon conviction of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified minimum term of imprisonment" (2011). Mandatory minimums are meant to prohibit judges from giving probation to those convicted of designated crimes. Upon conviction of one of these felonies, judges are required to sentence the defendant to a certain amount of time in prison, no matter the individual circumstances. Most states, including the four in this analysis, utilize a similar definition. While mandatory minimum fines, mandatory minimum terms of probation,

and other mandatory sentencing provisions do exist, mandatory minimum sentences for the purpose of this paper will always refer to terms of imprisonment.

Minimum punishments that do not include the word “mandatory” in their statute act as sentencing guidelines. Sentencing guidelines provide judges an acceptable range of potential penalties for a certain crime or criminal classification. However, without the word “mandatory”, judges are able to impose lesser sentences if they deem it appropriate. Additionally, mandatory minimums usually prohibit parole or the ability to obtain good time while in prison, a feature not shared by sentencing guidelines. The United States Sentencing Commission describes sentencing guidelines as “designed to be flexible and therefore assign varying weight to aggravating and mitigating factors in the context of the offense and the guidelines as a whole” (2011). This flexibility and capacity to consider the whole context is referred to as judicial discretion and is the ability of judges to have control over each individual case and sentence. Mandatory minimum sentences limit judicial discretion by taking the choice out their potential sentencing judgement. Guidelines, especially federal sentencing guidelines, act in a similar fashion to mandatory minimums. The Sentencing Reform Act of 1984 helped develop federal sentencing guidelines used today; it requires that the guidelines consider:

‘the nature and degree of the harm caused by the offense,’ ‘the community view of the gravity of the offense,’ ‘the public concern generated by the offense,’ ‘the deterrent effect a particular sentence may have on the commission of the offense by others,’ and ‘the current incidence of the offense in the community and in the Nation as a whole’ (The United States Sentencing Commission, 2011; 28 U.S.C. § 994(c)).

These considerations are used to “measure the relative seriousness of the offense” to find an appropriate punishment (The United States Sentencing Commission, 2011).

Mandatory minimums and sentencing guidelines have been found to identify the same aggravating factors when indicating why a lengthier sentence is necessary. This identification process produces a comparable higher-penalty effect; sentencing guidelines will actively promote the imposition of a higher sentence when an aggravating factor is present, similar to mandatory minimums. However, sentencing guidelines take into consideration the entire context of the case, including offense and offender-specific factors; mandatory minimums only take into account the aggravating factor (The United States Sentencing Commission, 2011).

The History of Mandatory Minimum Sentencing Laws

Mandatory minimum sentences have been around since our nation's inception and were traditionally used for "a core set of serious offenses, such as murder and treason, and also [were] enacted to address immediate problems and exigencies" (The United States Sentencing Commission, 2011). In 1951, the use of mandatory minimums shifted in three recognizable ways:

- 1) Congress added more mandatory minimums to the United States' Code
- 2) They expanded mandatory minimum penalties to apply to drug crimes, firearms, sex offenses, and child sex offenses
- 3) The average length of the mandatory period of incarceration was increased (The United States Sentencing Commission, 2011; Robertson, 2013)

In the 1980's, President Ronald Reagan sought to pursue "tough-on-crime" policies for the criminal justice system (Caulkins et. al., 1997). National events helped push his initiative into the spot light, such as the death of star basketball player, Len Bias. Bias was set to lead the Celtics after being the second pick in the NBA's 1986 draft. He died of cocaine intoxication in 1986, which sparked national debates on the devastating problem of drug use and addiction in the

United States (Weinreb, n.d.). Congressional members on both sides of the aisle were seemingly overwhelmed by Bias's death and the resulting public outcry. Dan Baum, in his book *Smoke and Mirrors*, refers to Len Bias as "the Archduke Ferdinand of the Total War on Drugs", referring to his role in the start of a new era in drug prosecution and mandatory minimum penalties (1996). Lawmakers used Len Bias throughout their narratives, as well as Don Rogers, a safety for the Cleveland Browns who died of cocaine intoxication shortly after Bias (Weinreb, n.d.). They used the deaths of these players to make emotional appeals and expedite the Anti-Drug Abuse Act of 1986. The United States Sentencing Commission details the passage of the Act by saying:

Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative process. As a result, Congress held no committee hearings and produced no reports related to the 1986 Act (2011).

The Criminal Justice Policy Foundation (CJPF) examined how this Act increased the mandatory minimum sentences for many drug crimes, including five years of imprisonment for being in possession of "five grams of crack, 500 grams of cocaine, one kilogram of heroin, 40 grams of a substance with a detectable amount of fentanyl, 5 grams of methamphetamine, 100 kilograms or 100 plants of marijuana, and other drugs" (n.d.). The difference in treatment of crack cocaine and cocaine during the 1980's through the 2000's was referred to as the "100-1" ratio and was rationalized by lawmakers through the idea that crack cocaine was "more dangerous than powder cocaine" and had an "especially deleterious effects on the communities where it was becoming increasingly prevalent" (The United States Sentencing Commission, 2011).

The targeting of crack cocaine had an immediate racial effect. As crack cocaine is a cheaper variation and option to powder cocaine, its users tend to come from lower socio-

economic communities. A study by CJPJ found that older generations of Black Americans, who would have already been adults during the 1980's, are more likely to have tried crack cocaine than their White counterparts (2012). But even now, there is a high racial disproportionality among crack cocaine users. Blacks made up around 37% of crack users in 2012 but were only 12.2% of the population (The United States Sentencing Commission, 2013).

After the Anti-Drug Abuse Act was fully integrated into the legal system, drug crimes became the most common offense in federal courts (Miller, 1995). An increasing number of studies found racial biases in the prosecution of crack cocaine immediately following the implementation of the Act. For instance, Berk and Campbell found a disproportionate number of African Americans in federal crack cocaine cases compared to state arrests, while there were no Whites charged with selling crack in federal court over the same four-year period (1993). Outside of crack cocaine convictions alone, the Act, along with the Sentencing Reform Act of 1984, was found to cause overall racial and ethnic disparities in the imposition of prison time and sentence length. From 1989-1990, Black and Hispanic offenders were 6-13% more likely to be imprisoned than White offenders, and Blacks were sentenced an average of 21 additional months than White offenders (Hispanic offenders were comparable to Whites in this section) (McDonald & Carlson, 1993). Advocacy groups such as Families Against Mandatory Minimums (FAMM) formed in the 1990's and spoke out, with the help of researchers and scholars, against these sentencing laws. One such scholar, Marvin D. Free Jr., compiled the instances of racial disparity in the criminal justice system, from arrests to sentencing and mandatory minimum penalties. He suggested that the law should be changed to "make penalties for identical amounts of powder and crack cocaine the same" to reduce racial bias, though he noted this could not be the entire

solution as it did not account for drug enforcement in lower socio-economic neighborhoods predominately comprised of minorities (Free, 1997).

In 2010, through the Fair Sentencing Act, Congress amended the mandatory minimum sentences for crack cocaine by raising the quantity for five- and ten-year mandatory terms of imprisonment to 28 and 280 grams, respectively. Similar to the passing of the Anti-Drug Abuse Act of 1986, there was bipartisan support for the Fair Sentencing Act of 2010 as criticism of sentencing guidelines and mandatory minimums came from all types of constituents. Despite this change, the Anti-Drug Abuse Act continues to act as a base for mandatory minimum sentences in federal courts (The United States Sentencing Commission, 2011).

Nebraska's Mandatory Minimum Statutes

Nebraska Revised Statutes § 28-105 (1) designates that Class IC and ID felonies carry mandatory minimum penalties of five years imprisonment and three years imprisonment, respectively. Similar to the federal code, Nebraska defines mandatory sentencing as “a person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation” (Neb. Rev. Statutes § 28-105 (4)). The annotations in Neb. Rev. Statutes § 28-416 specify that mandatory minimum penalties for felonies “affects both probation and parole . . . the offender will not receive any good time credit until the full amount of the mandatory minimum term of imprisonment has been served”. This means if an offender is convicted of a crime which carries a mandatory minimum sentence of 25 years imprisonment, they are required to complete a minimum of 25 years in prison before they are eligible for parole (State v. Russell, 2015).

Class IC felonies are as follows:

For drug crimes, as written in Neb. Rev. Statutes § 28-416 (7-10), being in possession of:

At least twenty-eight grams but less than one hundred forty grams [of cocaine] (Neb. Rev. Statutes §

At least twenty-eight grams but less than one hundred forty grams shall [of crack cocaine]

At least twenty-eight grams but less than one hundred forty grams [of heroin]

At least twenty-eight grams but less than one hundred forty grams [of amphetamine, its salts, optical isomers, and salts of its isomers, or with respect to methamphetamine, its salts, optical isomers, and salts of its isomers]

For crimes involving firearms, as written in Neb. Rev. § Statutes 28-1205 (c) and § 28-1212.04:

The use of a deadly weapon, which is a firearm, to commit a felony

Any person, within the territorial boundaries of any city of the first class or county containing a city of the metropolitan class or primary class, who unlawfully, knowingly, and intentionally or recklessly discharges a firearm, while in any motor vehicle or in the proximity of any motor vehicle that such person has just exited, at or in the general direction of any person, dwelling, building, structure, occupied motor vehicle, occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801

Class ID felonies are as follows:

For drug crimes, as written in Neb. Rev. Statute 28-416 (7-10), being in possession of:

At least ten grams but less than twenty-eight grams [of cocaine]

At least ten grams but less than twenty-eight grams [of crack cocaine]

At least ten grams but less than twenty-eight grams [of heroin]

At least ten grams but less than twenty-eight grams [of amphetamine, its salts, optical isomers, and salts of its isomers, or with respect to methamphetamine, its salts, optical isomers, and salts of its isomers]

For a crime involving the use of electronic devices in sexual assault, as written in Neb. Rev. Statute 28-320.02 (1-2):

No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of an electronic communication device as that term is defined in section 28-833, to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320

For crimes regarding visual depiction of sexually explicit conduct, as written in Neb. Rev. Statutes § 28-1463.03 and .04:

It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

It shall be unlawful for a person knowingly to purchase, rent, sell, deliver, distribute, display for sale, advertise, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

It shall be unlawful for a person to knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

Any person who is nineteen years of age or older at the time he or she violates this section will be guilty of a Class ID felony for each offense

For a crime involving some form of first-degree assault, as written in Neb. Rev. Statute § 28-929 (2):

Assault on an officer, an emergency responder, a state correctional employee, a Department of Health and Human Services employee, or a health care professional in the first degree shall

For some crimes involving firearms, as written in Neb. Rev. Statutes § 28-1206 (3) and § 28-1212.02:

Possession of a deadly weapon which is a firearm by a prohibited person is a Class ID felony for a first offense

Any person who unlawfully and intentionally discharges a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801

While it is generally only IC and ID felonies that carry mandatory minimum penalties, there are certain higher level—IB—crimes that have been specifically designated to carry lengthy mandatory minimum sentences. Sexual assault of a child in the first degree is one such crime and carries a mandatory minimum sentence of fifteen years upon the first conviction (Neb. Rev. Statutes § 28-319.01 (2)).

Nebraska also has a version of habitual offender mandatory sentencing enhancements. Neb. Rev. Statutes § 29-221 details the base habitual criminal classification, which carries a 10-year mandatory minimum, is defined as:

Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year

Other offenses only take a second conviction to trigger a mandatory minimum. In these cases, many increase the crime's class after a second offense of a similar nature, like raising a Class II felony to a Class IC felony in order to have the mandatory minimum penalty applied. Neb. Rev. Statutes § 28-813.01 (c) states that any person who has previously been convicted of a knowingly possessing a visual depiction of sexually explicit conduct involving a child, or a similar crime, shall be guilty of a Class IC felony and sentenced to a mandatory minimum of a five- year term of imprisonment.

In more severe instances of crimes regarding sexual assault, the Nebraska penal code raises both the crime classification and mandatory penalty. For instance:

Any person who is found guilty of second degree sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-319.01 for first degree or attempted first degree sexual assault of a child, or (d) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or section 28-319.01 shall be guilty of a Class IC felony and shall be sentenced to a mandatory minimum term of twenty-five years in prison (Neb. Rev. Statutes § 28-320.01 (4)).

Finally, Neb. Rev. Statutes § 28-319 (3) additionally discusses the second time penalty for sexual assault in the first degree; it does not raise the classification, but plainly states a mandatory minimum term of twenty-five years in prison. Overall, Nebraska's mandatory minimums affect

drug crimes, child sex crimes, offenses including firearms, and habitual offender or second time offender issues.

The Current Debate

In 2017, State Senator Ernie Chambers introduced LB 447, a bill designed to get rid of the language for IC and ID felonies indicating a mandatory minimum for any crime within these classifications. The bill's Statement of Intent is as follows:

This bill eliminates selected mandatory minimum sentences under section 28-105 by removing the word "mandatory" from the description of authorized penalties for Class IC and Class ID felonies. The sentencing range remains 5 to 50 years and 3 to 50 years, respectively. As drafted, mandatory minimums remain for 1st degree sexual assault (28-319), and sexual assault of a child (28-319.01 and 28-320.01 (2017)).

Chambers lists several reasons for introducing LB 447, including a lack of evidence showing a deterrent effect, mandatory minimum sentences' role in continued overcrowding in prisons, and their removal of good behavior incentives for inmates the misuse of prosecutorial power. While introducing his bill to the Judiciary Committee, Chambers commented:

Mandatory minimums do not protect the public. Mandatory minimums do not deter crimes. Those who commit crimes don't know what the penalty is, so they don't plan to get caught, they don't expect to get caught, so there can be no deterrence whatsoever (Judiciary Committee, 2017)

He later cited his and fellow senators' inability to pick out an offense and know the potential punishment off the top of their head. His logic is that if they do not know the designated penalty, neither would potential offenders. Fran Kaye, an English and Ethnic Studies professor at the University of Nebraska-Lincoln and 20-year active volunteer in Nebraska prisons echoed

Chamber's thoughts in a one-on-one interview. She argued, "they don't know the laws, they don't know if they're going to be charged with a Class IV felony or a Class II felony, they don't know what has a mandatory minimum and what does" (F. Kaye, personal communication, February 23, 2017). If Fran Kaye and Senator Chamber's arguments hold true for the majority of offenders, it would seriously undermine the potential for an existing deterrent effect from mandatory minimums. Corey O'Brien, the Criminal Bureau Chief of the Nebraska Attorney General's Office, maintains that he has witnessed the deterrent effect of mandatory minimums. He spoke about how he has seen sex offender chat rooms, and when a police officer pretending to be a child asks to meet up, often times, the adult will say no and give the reason that they know they will go to prison if they do. He argued their outwardness about fearing prison time proves a deterrent effect which, in turn, saves children's livelihoods. This is O'Brien's most cited reason for supporting mandatory minimums. He said, "If I prevent one child from getting victimized by a would-be offender because he knew he might go to prison—he would definitely go to prison if he touched that child—mandatory minimums are worth their weight in gold" (C. O'Brien, personal communication, February 21, 2017). When Fran Kaye was made aware of this statement, she contested that people believe they would go to prison for certain offenses due to common sense, not because of the existence of specific mandatory minimum penalties (F. Kaye, personal communication, February 23, 2017). That is, the potential sex offenders indicated they thought they would go to prison because it is common sense that a child sex offender, if convicted, would not be placed on probation and immediately released back into the community.

Chambers also asserted mandatory minimums lead to overcrowding in Nebraska prisons, an issue becoming increasingly substantial in Nebraska. The Bureau of Justice Statistics (BJS) found that Nebraska is ranked second in overcrowding, both when compared to other states and

the federal prison system. The Nebraska prison population in 2016 was at 126.2% capacity when observed at its highest potential capacity (Carson, 2018). Highest potential capacity is defined by BJS as “[t]he maximum number of beds reported across the three capacity measures: design, operational, and rated capacity” meaning 126.2% was the lowest potential percentage over-capacity that Nebraska prisons could mathematically be (Carson, 18). BJS found Nebraska’s over-capacity range was 126.2% to 157.8% in 2016 (Carson, 2018). The persistent problem with overcrowding in prisons was, arguably, one of the factors that led to multiple riots at the Tecumseh State Correctional Institution in 2015 and 2017. The combination of these two horrific riots resulted in over \$2.5 million dollars in damage and the death of four inmates (Duggan and Hammel, 2017; State Ombudsman’s Office, 2015). These events and ongoing issues with overcrowding have caused policy makers to introduce several pieces of legislation aiming to form a complete solution, one of which is Chamber’s LB 447. Those on both sides of the mandatory minimum debate acknowledge the existence of the sentencing law’s role in the overcrowding of Nebraska prisons; they do, however, disagree as to the extent of this role. While Senator Chambers believes mandatory minimums have a significant effect on overcrowding because it keeps offenders in prison for longer, others, such as Corey O’Brien and former prosecutor and State Senator Paul Schumacher assert that getting rid of mandatory minimums would have little to no effect on overcrowding (Judiciary Committee, 2017).

Paul Schumacher also introduced a bill in 2017 regarding mandatory minimums, LB 53. While this bill has been indefinitely postponed, Schumacher aimed to reduce the effect of mandatory minimums and bring in more judicial discretion by enacting a three-judge panel for convictions of offenses with the mandatory minimum penalty attached. He also stated his support for LB 447 and noted he believes fully eradicating mandatory sentences is the most ideal path to

a solution (P. Schumacher, personal communication, February 22, 2017). Despite this, Schumacher does not think getting rid of mandatory terminology will have a significant effect on the prison population. He instead commented on what he feels are issues that have a higher contribution to the overcrowding issue than mandatory minimums, including the underfunding of mental health care, and budgeting of the prison system (P. Schumacher, personal communication, February 22, 2017).

It is difficult to say with certainty how much prison overpopulation would be affected if mandatory minimum sentences were removed from the penal code. While the number of offenders in prison for Class IC and ID offenses are known, it is not a given that they would be granted probation if there was just a minimum guideline. However, they would be eligible for parole and good time and would therefore be released earlier than they currently would be. Corey O'Brien, acknowledging the potential of LB 447 to help with prison populations, contended:

While certainly elimination of mandatory minimums could potentially alleviate some of the current overcrowding this would amount to nothing more than a drop in the bucket. And for what benefits the elimination of these did yield would be drastically offset by the additional threats to public safety that the potentially earlier release of these inmates can now pose (C. O'Brien, personal communication, February 21, 2017).

Corey O'Brien explained that he believes if mandatory minimums do not exist, judges will be more inclined to give out probation to first time offenders, even with the most heinous crimes. State Senator Steve Halloran also questioned LB 447 on the grounds of public safety. During the introductory hearing on the bill, he noted, "for the protection of the citizenry, if someone is a repeat offender and they're in prison...there is that safeguard that they won't be committing that crime during the term that they're in prison" (Judiciary Committee, 2017). The public is indeed

protected from any potential crimes a particular offender may commit during their period of incarceration. However, Fran Kaye refuted this idea by discussing the lack of rehabilitation in prisons and how mandatory minimums can lead to higher rates of recidivism. She explained:

Sentences that are too long are our problem and mandatory minimums only result in sentences that are longer than necessary to punish offenders or to deter others from committing similar crimes people who are incarcerated for too long are much less likely to be successful in working their way back into society, so mandatory minimums that keep people in too long actually lead to more crime and more recidivism (Judiciary Committee, 2017).

There is some evidence to support larger rates of recidivism after periods of imprisonment compared to probation or community supervision. Nagin, Cullen, and Jonson (2009) conducted one such study and found incarceration to have a mild criminogenic effect—an increase in the chance for recidivism due to “anti-social prison experiences or to stigma endured upon release.” However, they noted the “mild” effect on recidivism rates was not strong enough to base policy change on, although they did find evidence depicting a lack of a deterrence from incarceration (Nagin et. Al., 2009). During offenders’ stay in prisons, Senator Chamber’s also claims, the ability to obtain “good time” for early release or parole is “a management tool used by the prisons to be an incentive for convicts to behave” (Judiciary Committee, 2017). He argues it removes the incentives for good behavior, so those who are serving a mandatory minimum term of imprisonment do not care about their behavior which puts the safety of correctional officers, other inmates, and the atmosphere of the prison is at risk. This negative attitude can contribute to the criminogenic effect of incarceration as laid out by Nagin et. al. (2009).

Outside of legislative hearings, Attorney General Doug Peterson continued the use rhetoric regarding the preservation of public safety; the Omaha World Herald quoted him saying “the removal of the mandatory minimum terms would have a detrimental effect on public safety by potentially allowing the some of the worst offenders to return to Nebraska’s communities in a shorter period of time or avoid prison entirely” (Omaha World Herald, 2017). The editorial continued, “these aren’t non-violent drug users who pose little threat. These are the people Nebraskans pay taxes to keep behind bars” (Omaha World Herald, 2017). Corey O’Brien has even said that he does not care about drug crimes and their mandatory sentences, but cares about “the ones where there’s victims or the ones where there’s violence, or the one’s where there’s firearms involved because these are the offenders that should be going to prison” (C. O’Brien, personal communication, February 21, 2017). However, many of the IC and ID felonies that would be affected by LB 447 are non-violent drug crimes, and the majority of the violent, sexual crimes O’Brien and Peterson refer to would be practically unaffected if the bill were to pass as is, especially after AM 546, an amendment reducing the scope of LB 447, was accepted. This is unlikely, however, as LB 447 has been indefinitely postponed.

O’Brien added additional reasons he cannot support eradicating mandatory minimums; he believes that without mandatory minimums, the system is left open to biased decisions (C. O’Brien, personal communication, February 21, 2017). His testimony during the Judicial Committee (2017) hearing included a hypothetical scenario:

There are cases where a judge might have two defendants who committed the same crime and are facing the same charges. One might be upper middle class who can afford a better lawyer than a lower-class defendant who has a public defender swamped with cases. In another case, one defendant might be white while the other is a minority. The judge may

give the upper middle class and the white defendants a lesser sentence because of subconscious biases, or socioeconomic beliefs.

To summarize, O'Brien is referring to the potential for judicial bias and asserts that mandatory minimums promote consistency among sentencing. That said, other issues arise when power is placed in the hands of the prosecutor. During the same legislative hearing, Senator Chambers said, "prosecutors misuse the system to make their job easier" (Judiciary Committee, 2017).

Spike Eickholt, who testified on the behalf of Nebraska Criminal Defense Attorneys Association and the ACLU of Nebraska, detailed how prosecutors in Nebraska use the threat of mandatory minimum penalties to secure plea deals, as it gives them leverage during negotiations. While plea deals do save time and money for the county and state, using the threat of a lengthy term of imprisonment to pressure a defendant to plead guilty to an offense has questionable constitutionality.

Mandatory Minimums in Texas

Texas has a record of having a strong criminal justice system, and in some ways, their system is reminiscent of the "tough-on-crime" era of the 1980's when mandatory minimums were at their height. However, Texas's penal code only uses a mandatory minimum penalty for the conviction of a capital felony. Texas Penal Code § 12.31 states:

- 1) a sentence of life imprisonment is mandatory on conviction of the capital felony, if the individual committed the offense when younger than 18 years of age; or
- (2) a sentence of life imprisonment without parole is mandatory on conviction of the capital felony, if the individual committed the offense when 18 years of age or older.

Texas's sentencing enhancements (i.e. habitual offender laws) do not carry mandatory minimums with them. They instead increase the felony charge similar to some of Nebraska's

practices regarding child pornography (Texas Penal Code § 12.425). The “habitual offender” will logically receive a greater sentence than they had previously received as the classification and severity has increased. Texas’s penal code still allows for judges to account for any unforeseen circumstances involving any one individual case. The context of the individual, charge, crime, or case may make the defendant underserving of a severe punishment in the eyes of the sentencing judge. An editorial by the Tyler Morning Telegraph, a newspaper located in Texas, criticized federal mandatory minimums and detailed why they do not exist in the state:

Conservatives believe in local control and accountability - and these are best served by eliminating mandatory minimums. This is particularly true in Texas, where our judges are elected (not appointed). If we don’t like the sentences they hand down, we can let them know directly - at the ballot box (2017)

Additionally, it should be noted that Texas is among the lowest in prison capacity in the nation; they were sitting at a comfortable 87.9% capacity in 2016, far below the threshold for overcrowding (Carson, 2018). Although, mandatory minimums cannot be confirmed as the cause of Texas’s low prison capacity.

Mandatory Minimums in Alabama

Alabama’s operationalization of mandatory minimums is similar to Nebraska’s definition. Alabama Code § 13A-12-232 states:

Any person who is found to have violated Section 13A-12-231, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for any type of parole, probation, work release, supervised intensive restitution program, release because of deduction from sentence for good behavior under corrections incentive time act or any other program, furlough, pass, leave, or any other

type of early, conditional, or temporary release program, nor shall such person be permitted to leave the penitentiary for any reason whatsoever except for necessary court appearances and for necessary medical treatment, prior to serving the mandatory minimum term of imprisonment prescribed in this article or 15 years, whichever is less. That is, anyone convicted of an offense that carries a mandatory minimum sentence is required serve the entirety of the mandatory minimum, or 15 years if the mandatory minimum is say 25 years, before being eligible for parole.

Alabama's mandatory minimum penalties for drug trafficking are as follows (Alabama Code § 13A-12-231):

For trafficking in cannabis, amphetamine, and methamphetamine:

- a. Is in excess of one kilo or 2.2 pounds, but less than 100 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 100 pounds or more, but less than 500 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years
- c. Is 500 pounds or more, but less than 1,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 1,000 pounds or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 28 grams or more of any type of cocaine, the offense is referred to as "trafficking in cocaine", and if the amount is:

- a. Is 28 grams or more, but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years

- b. Is 500 grams or more, but less than one kilo, the person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years
- c. Is one kilo, but less than 10 kilos, then the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 10 kilos or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama four grams or more of any type of morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, or four grams or more of phencyclidine, or any mixture containing phencyclidine or four grams or more of lysergic acid diethylamide, of four grams or more of any mixture containing lysergic acid diethylamide, the offense is referred to as “trafficking in illegal drugs”, and if the amount is:

- a. Is four grams or more, but less than 14 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 14 grams or more, but less than 28 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years
- c. Is 28 grams or more, but less than 56 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years
- d. Is 56 grams or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 1,000 or more pills or capsules of methaqualone, the offense is referred to as “trafficking in illegal drugs”, and if the amount is:

- a. Is 1,000 pills or capsules, but less than 5,000 pills or capsules, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 5,000 capsules or more, but less than 25,000 capsules, that person shall be imprisoned to a mandatory minimum term of imprisonment of 10 calendar years
- c. Is 25,000 pills or more, but less than 100,000 pills or capsules, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years
- d. Is 100,000 capsules or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama of 500 or more pills or capsules of hydromorphone, the offense is referred to as “trafficking in illegal drugs”, and if the amount is:

- a. Is 500 pills or capsules or more but less than 1,000 pills or capsules, the person shall be sentenced to a mandatory term of imprisonment of three calendar years
- b. Is 1,000 pills or capsules or more, but less than 4,000 pills or capsules, the person shall be sentenced to a mandatory term of imprisonment of 10 calendar years
- c. Is 4,000 pills or capsules or more but less than 10,000 pills or capsules, the person shall be sentenced to a mandatory term of imprisonment of 25 calendar years
- d. Is more than 10,000 pills or capsules, the person shall be sentenced to a mandatory term of life in prison without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 28 grams or more of 3,4-methylenedioxy amphetamine, or of any mixture containing 3,4-methylenedioxy amphetamine, the offense is referred to as “trafficking in illegal drugs”, and if the amount is:

- a. Is 28 grams or more, but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 500 grams or more, but less than one kilo, the person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years
- c. Is one kilo, but less than 10 kilos, then the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 10 kilos or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 28 grams or more of amphetamine or any mixture containing amphetamine, its salt, optical isomer, or salt of its optical isomer thereof, the offense is referred to as “trafficking in amphetamine”, and if the amount is:

- a. Is 28 grams or more but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 500 grams or more, but less than one kilo, the person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years
- c. Is one kilo but less than 10 kilos, then the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 10 kilos or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 28 grams or more of methamphetamine or any mixture containing methamphetamine, its salts, optical

isomers, or salt of its optical isomers thereof, the offense is referred to as “trafficking in methamphetamine”, and if the amount is:

- a. Is 28 grams or more but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 500 grams or more, but less than one kilo, the person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years
- c. Is one kilo but less than 10 kilos, then the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 10 kilos or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

For knowingly selling, manufacturing, delivering, or bringing into Alabama 56 or more grams of a synthetic controlled substance or a synthetic controlled substance analogue, the offense is referred to as “trafficking in synthetic controlled substances”, and if the amount is:

- a. Is 56 grams or more, but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years
- b. Is 500 grams or more, but less than 1 kilo, the person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years
- c. Is one kilo, but less than 10 kilos, then the person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years
- d. Is 10 kilos or more, the person shall be sentenced to a mandatory term of imprisonment of life without parole.

The 2012 Judges' Sentencing Reference Manual, the most recent version of Alabama's judicial guide for circuit and district judges, details the remaining mandatory minimum penalties and sentencing enhancements. Citing Alabama Code §13A-12-233, the manual covers other enhancements for drug trafficking, including a mandatory minimum of 25 years imprisonment upon the first conviction of running a drug enterprise and a mandatory term of life without parole upon the second conviction. This section also details how a mandatory minimum can be waived if the offender "provides substantial assistance in the arrest or conviction of any accomplices, accessories, co-conspirators, or principals"; the reduction must be made by the district attorney and cannot apply to those facing life imprisonment, such as someone charged for the second time with running a drug enterprise (Alabama Sentencing Commission, 2012).

For Class A Felonies involving child sex offenders, there is a minimum of a 20-year term of imprisonment. For Class B Felonies involving child sex offenders, there is a minimum of a 10-year term of imprisonment. While these penalties do not have "mandatory" attached, Alabama Code §13A-5-6 and §13A-5-11 stipulate anyone convicted of these crimes are not eligible for probation, good time, parole, or split sentence. At its essence, these statutes act in almost identical fashion to mandatory minimums; judges must impose a prison sentence and the offender cannot be released early. However, this form of sentencing enhancement still leaves room for the judge to impose a shorter term of imprisonment if they deem it appropriate for the individual (Alabama Sentencing Commission, 2012).

Alabama's habitual felony offender law, found in Alabama Code §13A-5-9, only utilizes the term mandatory once; if an offender commits a Class A Felony and has three prior felony convictions, they will face mandatory imprisonment for life without possibility of parole. This is not technically a mandatory minimum as the judge cannot sentence the offender to a longer term

of imprisonment; it is a mandatory sentence as it is the only option available to the sentencing judge.

As shown above, most of Alabama's mandatory minimum sentences are for drug crimes, specifically drug trafficking. For some of these drug crimes, such as the punishment for cocaine possession, Nebraska's mandatory penalties are more severe than Alabama. For instance, a three-year mandatory minimum in Nebraska is triggered when an offender is in possession of 10 grams of cocaine, versus the 28 grams of cocaine necessary for the same mandatory sentence in Alabama. That said, Nebraska does not have any mandatory terms of life imprisonment, and this particular penalty may be why Alabama is the only state with a more critical overcrowding problem; the state's prisons were around 175.7% capacity in 2016 (Carson, 2018). Alabama policy makers have taken steps to reduce overcrowding, namely passing a bill in 2015 that created a Class D Felony meant to keep non-violent drug offenders out of prison (Yurkanin, 2017). However, the mandatory minimum for fentanyl trafficking was added just two years later due to an uptick in fentanyl deaths, quickly counteracting the recent prison reform efforts. Criminal defense attorneys in Alabama, like Brian White, are concerned about this reactionary policy because it perpetuates "the same old idea that we're going to incarcerate and coerce our way into a drug free society and that battle has been waged and lost already" (Yurkanin, 2017). Similar to Nebraska, supporters of this new penalty believe it is working toward promoting public safety, by "put[ting] people behind bars who truly belong there" (Yurkanin, 2017)

Mandatory Minimums in California

While California does not include mandatory minimum terminology in their penal code, they do include a provision listing certain crimes where probation cannot be granted. This is similar to Nebraska's operationalization of mandatory minimums without the prohibition from

good time, parole, and shorter prison sentences where the judge deems it appropriate. Even still, the California code states “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation” in the statute where offenses prohibited from probation are listed (California Penal Code § 1203 subd. (e)). So, unless there are unique circumstances, a judge cannot grant probation for the following offenses, as quoted from California Penal Code § 1203 subd. (e):

- (1) . . . any person who has been convicted of arson, robbery, carjacking, burglary, burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, trainwrecking, kidnapping, escape from the state prison, or a conspiracy to commit one or more of those crimes and who was armed with the weapon at either of those times.
- (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.
- (3) Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.
- (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.
- (5) . . . any person who has been convicted of burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, train wrecking, extortion, kidnapping, escape from the state prison, a violation of Section 286, 288, 288a, or 288.5, or a conspiracy to commit one or more of those crimes.

(6) Any person who has been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, if he or she committed any of the following acts:

(A) Unless the person had a lawful right to carry a deadly weapon at the time of the perpetration of the previous crime or his or her arrest for the previous crime, he or she was armed with a weapon at either of those times.

(B) The person used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the previous crime.

(C) The person willfully inflicted great bodily injury or torture in the perpetration of the previous crime.

(7) Any public official or peace officer of this state or any city, county, or other political subdivision who, in the discharge of the duties of his or her public office or employment, accepted or gave or offered to accept or give any bribe, embezzled public money, or was guilty of extortion.

(8) Any person who knowingly furnishes or gives away phencyclidine [PCP].

(9) Any person who intentionally inflicted great bodily injury in the commission of arson under subdivision (a) of Section 451 or who intentionally set fire to, burned, or caused the burning of, an inhabited structure or inhabited property in violation of subdivision (b) of Section 451.

(10) Any person who, in the commission of a felony, inflicts great bodily injury or causes the death of a human being by the discharge of a firearm from or at an occupied motor vehicle proceeding on a public street or highway.

(11) Any person who possesses a short-barreled rifle or a short-barreled shotgun under Section 33215, a machinegun under Section 32625, or a silencer under Section 33410.

(12) Any person who is convicted of violating Section 8101 of the Welfare and Institutions Code [supplying a deadly weapon to a prohibited person].

(13) Any person who is described in subdivision (b) or (c) of Section 27590 [including a previous conviction involving a hand gun or firearm, supplying a minor with a firearm, or an active participant of a criminal street gang].

Though these are not mandatory minimums, it is still interesting to note there is only one mention of a drug offense in this section. An offender who commits a drug offense, besides supplying phencyclidine, can still potentially face the sentencing enhancement, unavailability of probation, if their offense also applies to one of the additional add-ons laid out above. For instance, if someone was convicted of selling cocaine while being in possession of a firearm, and they were charged for a second time with being in possession of methamphetamines, they would be subject to the punishment in this section (California Penal Code § 1203 subd. (e)(6A).

In 2012, California saw its habitual criminal offender law change through Proposition 36. According to Ballotpedia, 69.3% of voters voted in favor of the new law. Proposition 36 is significant for three reasons:

(1) [It] revise[d] the three strikes law to impose life sentence only when the new felony conviction is "serious or violent."

(2) Authorize[d] re-sentencing for offenders currently serving life sentences [at the time] if their third strike conviction was not serious or violent and if the judge determine[d] that the re-sentence [would] not pose unreasonable risk to public safety.

- (3) Maintain[ed] the life sentence penalty for felons with ‘non-serious, non-violent third strike if prior convictions were for rape, murder, or child molestation’ (Ballotpedia, 2012).

The above aspects are written to reduce sentencing for non-violent offenders, while still maintaining severe sentencing for the most heinous crimes. The retroactive component of Proposition was designed to both reduce overcrowding in prisons and provide tax payer support; it was estimated that the proposition is saving California over \$100 million every year (Voter Information Guide, 2012). In 2010, two years prior to the implementation of the proposition, California was at 153% average capacity, and in 2016, their prison population had been reduced to 111.5% capacity (Guerino, Harrison, and Sabol, 2011; Carson, 2018). It is probable that the implementation of Proposition 36 did have some effect on the overcrowding in California prisons.

Within California’s habitual criminal law for sexual offenders, the term “mandatory minimum” does not exist. California Penal Code § 667.71 (b) and (e) reads:

(b) A habitual sexual offender shall be punished by imprisonment in the state prison for 25 years to life. . . .

(e) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section.

Again, California’s penal code just prohibits the use of probation while leaving the potential for good time and parole in-tact. Unlike Nebraska, where prisoners are eligible for parole after serving 50% of their sentence, in California, offenders must serve 85% of their sentence before eligibility (Neb. Rev. Statutes § 83-1 (107); California Penal Code § 2933.1). This means that

not including the prohibition of good time in their sentencing laws and enhancements does not have as large an effect as it would in Nebraska.

Mandatory Minimum Policies in Federal Courts

The federal penal code offers potential reliefs to mandatory minimum sentences. Similar to Alabama, federal courts have the ability to give a lower sentence if a “substantial assistance” mechanism is satisfied when “a defendant provides substantial assistance in the investigation or prosecution of another person” (Federal Rule of Criminal Procedure 35(b) and 18 U.S.C § 3553 as reported by The United States Sentencing Commission, 2011). In its 1986 inception, Federal Rule of Criminal Procedure 35(b) gave the court full discretion and responsibility to determine and reduce an offender’s sentence within 120 days post sentencing (The United States Sentencing Commission, 2011). The Sentencing Reform Act amended this rule significantly, the Rule now reads:

Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. . . . When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute (Federal Rule of Criminal Procedure 35, 2009)

The court now has to wait for a government actor to file a motion to reduce the sentence, but the allotted time to reduce the sentence has been increased by approximately nine months. Enacted as an amendment to the Anti-Drug Abuse Act, 18 U.S.C § 3553 “grants a court limited authority to impose a sentence below a mandatory minimum penalty at the time of sentencing” (The United States Sentencing Commission, 2011). The second mechanism for relief from mandatory

minimum penalties is referred to as “the safety valve” and is housed under subsection (f) of 18 U.S.C. § 3553. It states:

the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement (Violent Crime Control and Law Enforcement Act of 1994, Title VIII § 8001, 1994).

Offenders have to meet all five criteria in order for the mandatory minimum sentence to be lowered.

How mandatory minimum penalties have been handled in federal court has seen changes. Eric Holder, former United States Attorney General, issued a policy in 2013 outlining changes in prosecutorial discretion for federal attorneys. He wrote, citing *Alleyne v United States* to show the substantial prosecutorial role in mandatory minimums:

Pursuant to my memorandum of May 19, 2010, prosecutors should continue to conduct ‘an individualized assessment of the extent to which particular charges fit the specific circumstances of the case. . .’ While this means that prosecutors ‘should ordinarily charge the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction,’ the charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct.

This first policy is call for mindful prosecutorial discretion; Eric Holder is asking the attorneys under his authority to look at each individual offender and use proper discretion to act in a fair capacity. He continued:

in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:

The defendant's relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;

The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;

The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and

The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions (2013).

This second part takes a similar approach to the “safety valve” relief mechanism discussed earlier, though this memorandum works for prosecutorial discretion versus the judicial discretion mechanism of the “safety valve”. Because Congress would not repeal mandatory minimum sentences in Title 21, Holder decided to send out this memorandum telling his prosecutors not to charge any defendant with an offense that carries one of these mandatory minimums, effectively nullifying these sentencing laws. He chose to use his ability to influence prosecutorial discretion to change the impact of legislation. Another former United States Attorney General, Jeff Sessions, took a opposite stance on prosecutorial power and disagreed with Holder’s policy to not pursue the highest applicable charge. Jeff sessions has spoken in favor of mandatory minimum sentencing guidelines on multiple occasions. He believes his advocacy for mandatory minimum penalties and longer terms of imprisonment have “empowered our prosecutors to charge and pursue the most serious offense as I believe the law requires - most serious readily provable offense” and added that this strong prosecutorial action “is simply the right and moral thing to do” (NPR, 2017). Holder, on the opposite end, feels “[i]n some cases,” he stated in his memorandum, “mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities” (2013).

Another section of Eric Holder's policy changing memorandum, regarding advocacy of the "safety valve", was as follows:

Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). In determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct, common scheme, or plan (2013)

This section was meant to draw prosecutors' attention to the "safety valve" function of 18 U.S.C. § 3553. His aim was to make attorneys aware and push for them to advocate for and consider this relief for each case where a defendant faced a mandatory minimum penalty. In his final section, Holder writes:

Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions.

When determining whether an enhancement is appropriate, prosecutors should consider the following factors:

Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;

Whether the defendant was involved in the use or threat of violence in connection with the offense;

The nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;

Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;

Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and

Other case-specific aggravating or mitigating factors.

The “information pursuant to 21 U.S.C. § 851” refers to the prosecutor’s role in establishing prior convictions in illegal drug hearings and trials that cause increased sentencing enhancements, such as mandatory minimums. The statute is as follows:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (21 U.S.C. § 851 (a)(1))

This statute means in order for a sentencing enhancement, which generally includes a lengthier prison sentence, to be placed on a drug crime detailed within Title 21, the United States Attorney must be the one to file information regarding the defendant’s prior conviction or convictions.

Eric Holder appealed to prosecutors to not file this information unless they deem it appropriate and necessary—based on the considerations he laid out.

Discussion: Next Steps for Nebraska

Mandatory minimums in Nebraska leave themselves open to a simple, but strong criticism. Though, as the Attorney General, Doug Peterson, and the Criminal Bureau Chief of the Nebraska Attorney General's Office, Corey O'Brien have argued, mandatory minimums aim to target the most severe crimes, such as child sexual assault, there are discrepancies within the offenses that carry mandatory minimum penalties. While being in possession of 28 grams of cocaine or heroin or meth ensures a mandatory minimum penalty of a five-year term of imprisonment without the opportunity for parole, being in possession of 140 grams of any of those illegal drugs does not constitute a mandatory minimum penalty. The former is a Class IC Felony which has a mandatory minimum, with the latter is a Class IB Felony which hold a higher minimum (20-year term of imprisonment), but as it is not mandatory, the offender facing that charge could potentially be granted probation or a lesser sentence (Neb. Rev. Statutes § 28-105). That is not to say they would be granted probation, but it would be up to the judge to consider everything and make an informed judgment in the name of justice. Even if the judge decided to sentence this hypothetical offender to 20 years in prison for a IB felony drug conviction, that offender is eligible to obtain good time. Logically, they would act accordingly in order to ensure an early parole. This was the management function of good time detailed by Senator Chambers that is lost with mandatory minimum penalties.

Another disparity along the same lines, but with a violent crime, comes from the statute for first-degree sexual assault. Sexual assault is a Class II Felony which carries a minimum term of one-year in prison (Neb. Rev. Statutes §23-319 and § 28-105). If prosecutors and law enforcement are keen on pursuing violent crimes with mandatory minimum penalties and truly do not care about drug offenses, then the question of why sexual assault does not have a mandatory minimum but being in possession of 28 grams of cocaine requires a five-year prison

sentence needs to be addressed. During the Judiciary Committee hearing in 2017, Senator Baker asked Ernie Chambers why certain Class II felonies, such as human trafficking, do not have mandatory minimums, but certain drug crimes do. Senator Chambers responded that he did not know and referred to the sentencing laws as “irrational” (Judiciary Committee, 2017). Mandatory minimums penalties need to be tackled and changed through passable legislation in Nebraska. As seen throughout recent legislative sessions, reactions to bills similar to LB 447 have remained consistent and opposed by the majority. Unfortunately, enacting policy change through prosecutorial discretion similar to Eric Holder’s memorandum is unlikely as the opinion of Nebraska’s Attorney General are clear and very much in opposition to the previous United States Attorney General.

Texas’s practices should be considered when thinking about Nebraska’s next steps, especially as they are well below 100% capacity in their prisons. Though Texas is viewed as having one of the harsher criminal justice systems in the nation, its sentencing enhancements and use of mandatory minimums are almost downright progressive. Texas has invoked a system rooted deeply in trust of judicial discretion. The editorial written by the Tyler Morning Telegraph detailed how this power should remain with judges in Texas because they are elected into office and can be held accountable for their actions (2017). Whereas prosecutors are appointed by a government actor, and the public has little to no say on their continued work in that position. This leaves little room for the public to identify and take actions toward the culpable person.

Texas is not the only entity to agree with judicial power trumping prosecutorial discretion. The Criminal Justice Policy Foundation wrote in reference to the Anti-Drug Abuse Act and the mandatory minimums that it created, “[i]n essence, Congress abandoned the idea that Federal judges -- appointed by the President and confirmed by the U.S. Senate -- have the

wisdom and training to identify the most serious drug offenders and punish them appropriately” (n.d.). They feel judges have the proper training, and therefore ability, to make a fair and unbiased decision regarding the proper sentence for a certain offense. In Nebraska, judges are trusted with handling the sentencing of most higher level, Class IB Felonies, as they tend to only carry a minimum guideline. Nebraska law makers need to consider judicial retention elections during their deliberations on getting rid of mandatory minimums and restoring power to judges. If Nebraskans are truly concerned about certain judges granting probation to offenders who would be in prison with a mandatory minimum penalty, they have the option to not vote for those judges the following election. In the most recent election alone, there were 32 judges up for retention in Nebraska (State of Nebraska Judicial Branch, 2018).

With regards to Alabama’s policy, Nebraska should look to their penal code to understand the unforeseen consequences of extensive mandatory minimums for non-violent drug crimes and reactionary legislation. Alabama’s additional mandatory minimums for trafficking in fentanyl has made many in the state weary of this reactionary legislation, especially during a time where policy makers are working towards criminal justice reform and the reduction of overcrowding in prisons. Sarah Harkless, with the Wellness Coalition, detailed Alabama’s opioid epidemic. Citing the 2015 National Household Survey on Drug Use and Health, she found Alabama made up five percent of the United States’ population but uses about 80% of opioid drugs, including fentanyl (Harkless, 2016). In Jefferson County, the largest county in Alabama and home to Birmingham, deaths caused by fentanyl overdose went from 14 in 2012 to 74 in 2015 to almost 200 in 2016 (Harkless, 2016; Yurkanin, 2017). State Senator Cam Ward, who sponsored the bill regarding fentanyl use, called for quick passage, citing the urgency of the problem (Yurkanin, 2017). In the same article, Johnathan Caulkins, a drug policy expert and

professor at Carnegie Mellon University, was interviewed and noted how the opioid epidemic was a “terrifying” and “horrific” problem (Yurkanin, 2017). However, he also made clear how sentencing laws, such as mandatory minimums or other enhancements, rarely reduce drug use and trafficking. He explained by saying that “it is easy to replace drug dealers imprisoned for long periods of time . . . the people supplying [drugs] will find someone willing to risk prison to make money” (Yurkanin, 2017). Caulkins refers to this type of drug crime as “consensual crime” and states they are a “function of demand”; “[d]emand is the summation of the tastes and preferences of hundreds of millions of potential consumers, not a policy variable which the government can easily control” (Caulkins and Reuter, 1997). This idea means that while criminal sanctions, such as mandatory minimum penalties, can disturb the cycle of drug trafficking, it has little long-term effect. Caulkins recommends, instead of implementing reactionary sentencing policies, that “states should focus on strategies to decrease the number of new addicts, which could include outreach to the medical community to reduce opioid prescriptions that can lead to heroin use” (Yurkanin, 2017).

There is no current push in Nebraska for incorporating additional mandatory minimum penalties into the penal code. However, within the current public safety discourse, there is continued fear of predators and other violent offenders. Nebraska law makers should be weary of potential reactionary legislation based in emotional appeals and void of thorough questioning, such as the Anti-Drug Abuse Act. Deliberation is always recommended for proper and appropriate legislation, especially in Nebraska’s unicameral system where there are less steps required for passage.

Nebraska and California’s use of mandatory minimums are poles apart, although, Nebraska did have a recent bill reminiscent of Proposition 36. Introduced by State Senator Patty

Pansing Brooks during the 2018 legislative session, LB 1013 was drafted to limit Nebraska's habitual criminal enhancement to only apply to violent felonies. The statement of intent was as follows:

Current statute states that whoever has been twice convicted of a felony crime, sentenced and committed to prison for more than one year, shall upon conviction of a felony, be deemed to be a habitual criminal and shall be punished with mandatory minimum penalties. LB1013 keeps the habitual criminal statute but limits its application to violent felonies only (Pansing Brooks, 2018).

In her introduction during a 2018 Judiciary Committee hearing, Pansing Brooks told the story of one Nebraska offender:

In 2014, we had a woman convicted of one criminal conviction, criminal possession of a financial transaction device; two, shoplifting; and three, second-degree forgery. She was given a flat sentence of ten to ten years. I would argue that this was a significant waste of state dollars. LB1013 would allow the habitual criminal law to apply only to serious and violent felonies and certainly not forgery.

As discussed earlier, California's Proposition 36 was predicted to save the state an annual amount of approximately \$100 million dollars. Since Nebraska is a significantly smaller state than California, and therefore has a smaller criminal justice system, the potential savings would not be near this amount, but could still be noteworthy. LB 1013 was indefinitely postponed in 2018 but could be reinvigorated in the future. Policy makers should look at Propositions 36's retroactive aspect for additional ways to save tax dollars.

As far as California's lack of using mandatory rhetoric within their penal code, it is important to note the state still calls for prison time for serious crimes. Their criminal justice

system is not acting in a merely lenient fashion, instead, California has analyzed which crimes are the most severe and harmful and save prison sentences for those offenses. Their section detailing what crimes cannot be granted probation could be applied to Nebraska's penal code. Corey O'Brein and others who support the use of mandatory minimums have stated their concern for the possibility of judges granting probation to violent offenders and those offenders immediately being released back in the community (Judiciary Committee, 2017). Changing the penal code to state the prohibition of probation for offenses which currently have mandatory minimums would satisfy this concern. These offenders would not be granted probation and would therefore be deterred from committing additional offenses during their period of imprisonment. This would also solve Ernie Chamber's worry about parole and the inability of Class ID and IC offenders, as well as other offenders serving mandatory minimum sentence, to obtain good time. Under a statute similar to California's code, offenders not granted probation would still have the opportunity to be granted parole. Not only does parole save the state money, as Nebraska does not have to continue to pay the expensive living costs of released inmates, it also promotes good behavior and a collaborative prison system (Polinsky, 2015). Moreover, as Fran Kaye advocated, lengthy prison sentences do more harm than good. She argued, "the most important thing that long sentences do is completely destabilize people, break them away from their family and community, and make it much, much harder for them to get or keep jobs when they come out" (Kaye, F., personal communication, February 23, 2017). Other research has identified the importance of maintaining strong familial ties and interpersonal relationships for the reduction of the likelihood of reoffending and easing the process of reentering the community, post-offense (Hariston, 1991). This idea was held up by another study that found evidence of a "reduction in rule-breaking behavior" after a prisoner received a visit from family

members; this suggests the existence positive effect of being around family on criminal behavior (Claire and Dixon, 2017). Maintaining personal relationships is easier when an offender is granted probation or another form of community supervision, as their family and friends do not have to go to a prison in order to have a meaningful interaction. Furthermore, those granted probation are still held responsible for their actions, but they do not have to go through a reintegration process where they face stigma and negative reactions from their community. For these reasons, the Nebraska legislature should consider following California's lead by including a provision where in unusual cases, judges should have the ability to grant probation to offenders, as long as the judgement is in the interest of pursuing justice (California Penal Code § 1203 subd. (e)).

The terminology "unusual cases" may be too vague for Nebraska's penal code, so, as to provide clear judicial instruction, another recommendation would be to follow the "safety valve" mechanism of the federal penal code for mandatory minimums. To reiterate, an offender can be given a penalty below the designated mandatory minimum if they meet five criteria:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement (Violent Crime Control and Law Enforcement Act of 1994, Title VIII § 8001, 1994).

This relief mechanism supports the idea that not every offender who commits the same offense is equal and some form of review is necessary for proper sentencing to occur. However, a recommended change would be to give the responsibility of reviewing these criteria to judges rather than prosecutors. Attorney General Eric Holder had to remind and call for United States prosecutors to review these criteria for each case where a mandatory minimum penalty was attached. If it was the duty of prosecutors in Nebraska to file motions for lower sentences, it is reasonable to assume they would rarely act in this capacity. Especially since Nebraska Attorney General Doug Peterson does not share Eric Holder's opinion. It is unlikely he would call for attorneys to review these criteria for mandatory minimum cases and file motions whenever possible. This responsibility should be left to judges who already review individual circumstances, such as these five criteria, for other offense sentences without mandatory minimum penalties. With the issue of mandatory minimum reform, the debate often boils down to who to trust with discretion: judges or prosecutors. In Nebraska, since judges are elected officials, it is democratic to give more responsibility and clout to judges who can be held accountable by the public.

The next steps for Nebraska, with regard to mandatory minimum sentences, could go in a variety of directions. Law makers could follow in the steps of Texas and California and rid the penal code of mandatory minimum language to allow for a system entrenched in judicial discretion. If this is too open for comfort, they should consider prohibiting probation for certain crimes or felony classification, similar to California's penal code. Or Nebraska could adopt the federal system of using a "safety valve" relief mechanism that allows for discretion while maintaining clear guidelines and requirements. As for the mandatory minimums attached to habitual criminal laws, Senator Pansing Brooks bill, LB 1013, or one similar to California's Proposition 36, should be reconsidered by the Nebraska legislature. The current sentencing statutes are misaligned with the rest of the nation; not even Alabama with one of the harshest penal codes in the United States, uses mandatory minimums for their habitual criminal statutes. Finally, it needs to be reiterated that Nebraska should watch out for any reactionary legislation to certain offenses.; as seen by Alabama's mandatory minimum bill regarding trafficking in fentanyl, this type of legislation just costs the state money and puts non-violent offenders in prison for longer.

following

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